FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 511.

JOHN F. NOBLE, Doing Business as NOBLE TRANSIT COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

BRIEF IN BEHALF OF THE CONTRACT CARRIER DIVISION OF THE AMERICAN TRUCKING ASSNS., INC.

On Appeal From the District Court of the United States, District of Minnesota, Third Division.

C. D. TODD, JR.,
Attorney for Intervenor.

Washington, D. C.
March 26, 1943.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

FOREWORD 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

QUESTIONS PRESENTED 3

SUMMARY OF ARGUMENT 4

I. Argument 7
Questions Presented are of a Legal Nature and do not Require the Weighing of the Evidence by the Court 7

1. The Commission's Power to Issue Permits Governed by Statute 7

2. Proper for the Court to Disturb Order of the Commission When It Misconstrues the Law ... 8

II. The Findings, Conclusions and Order of the Court Erroneously and Unlawfully Restrict the Liberal Provisions of the "Grandfather" Clause and Related Provisions of the Act, by Applying to and Embodying in that Clause the More Restrictive Provision as to Procedure in Section 209 (b) of the Act in Determining the "Grandfather" Rights Set Forth in Section 209 (a) of the Act, and Failed to Interpret the Meaning of the Liberal Language Employed by Congress in Defining, Designating and Determining "Grandfather" Rights as Distinguished from the Rights of Carriers who Seek New or Extension Operations. (Assignment of Error 6, R. 353) 9

1. Terms of "Grandfather" Clause Given Permit to Which Appellant Is Entitled 10

2. Commission Applied a Standard For Determining Rights Which Is Not Found in the Law 14

Page

III. The Decision and Order of the Court Erroneously and Unlawfully Recognize a Power in the Interstate Commerce Commission to Define the Business of the Carrier and the Scope Thereof by Designating the Business, or Merely Some Part Thereof, of the Shippers for Whom the Petitioner May Transport Commodities, Whereas the "Grandfather" Clause of the Motor Carrier Act of 1935 and its Amendment and Related Provisions Limit the Power of the Commission to Define the Business of the Carrier, Under a "Grandfather" Operation, by the Commodities he Carried and the Territory he Served. (Assignment of Error 4, R. 352) 17

1. The Statute Does Not Require Imposition of the Restriction 17

2. Imposition of Restriction Contrary to Congressional Intent 21

IV. The Findings, Conclusions and Order of the Court Unlawfully Restrict the Right of the Plaintiff to Substitute or Add Contracts Other Than With Packing Houses and Food Canneries, Contrary to the Proviso of Section 209 (b) of the Motor Carrier Act. (Assignment of Error 8, R. 353.) 25

1. The Order As Presently Written Would Prohibit Service to Shippers Other Than Packing Houses and Food Canneries 25

2. If the Opinion of the Lower Court is Followed, the Proviso Found in Section 209 (b) Will Be Rendered Meaningless 26

V. CONCLUSION 27

APPENDIX 30

(A) PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE 30

(B) GENERAL DUTIES AND POWERS OF THE COMMISSION 32

TABLE OF CASES CITED.

	Page
Baltimore and Ohio Railroad Company v. United States, 277 U. S. 291, 299-300	8
C. and D. Oil Company Contract Carrier Application, 1 M. C. C. 329, 332	14
Cong. Rec. 5654 and 5664	22, 23
Duplex Printing Press Company v. Deering, et al., 254 U. S. 443	21
Keystone Transportation Company Contract Carrier Application, 19 M. C. C. 475	14, 28
19 M. C. C. 491	15
19 M. C. C. 494	15
19 M. C. C. 502	15
A. Magnano Company v. Hamilton, Atty. Gen., et al., 292 U. S. 40	18
Motor Carrier Act of 1935	2, 17, 21, 23, 25
Part II, Interstate Commerce Act	2, 3, 4, 6, 7, 8, 9, 16, 20, 21, 23, 27, 30, 31, 32
Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433	8
U. S. of America and Interstate Commerce Commission v. Carolina Freight Carriers Corporation, 315 U. S. 475	8, 16, 17, 21, 28, 29
315 U. S. 489	17
315 U. S. 481	29
United States v. Missouri P. R. Co., 278 U. S. 269	8
United States v. Pennsylvania Railroad Company, 242 U. S. 208, 229	8
Webster's New International Dictionary	18

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 511.

JOHN F. NOBLE, Doing Business as
NOBLE TRANSIT COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

BRIEF IN BEHALF OF THE CONTRACT CARRIER DIVISION OF THE AMERICAN TRUCKING ASSNS., INC.

On Appeal From the District Court of the United States, District of Minnesota, Third Division.

FOREWORD.

The undersigned attorney presents this brief as amici curiae in behalf of the Contract Carrier Division of the American Trucking Associations, which is a non-profit trade association, the members of which are all contract motor carriers. Many of the member carriers are subject to the jurisdiction of the Interstate Commerce Commission and therefore, have a vital interest in the questions of statutory construction and application involved in this case, even

though they have no interest in the extent of the authority to which appellant may be entitled. This brief, therefore, will confine itself to a discussion of the questions presented in so far as they concern the construction and application of the provisions of the statute involved.

STATUTE INVOLVED.

The relevant provisions of Part II of the Interstate Commerce Act, on the date of the Commission's order of May 13, 1941, are set forth in the Appendix, infra, pp. 30 to 32.

STATEMENT OF THE CASE.

The Contract Carrier Division being interested only in the construction placed upon the provisions of law involved will offer, but a brief statement of the facts. A more detailed factual statement is set forth in appellant's brief.

Appellant in September, 1934, began a motor transportation business. (R. 333) After the Motor Carrier Act, 1935, was enacted and became law, appellant made timely application for a contract carrier permit. (R. 334) The Interstate Commerce Commission, By Division 5, Commissioners Lee, Rogers and Patterson on May 13, 1941, decided the application making the following findings: (R. 14-23)

> *Findings:* We find that on July 1, 1935, and continously since, applicant has ben in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce *under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses,* (a) of cannen foods from Blue Island, Illinois, to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minnesota, and (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul, to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and Points in that portions of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wiscon-

sin, and U. S. Highway 53 from La Crosse to Cameron, Wisconsin, and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minnesota, and La Crosse, Wisconsin; over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied. (R. 23) (Italics added)

Appellant filed a petition for reconsideration with the Interstate Commerce Commission which was denied on August 26, 1941. (R. 25) After the denial of the petition for reconsideration, appellant filed a complaint in the District Court of the United States, District of Minnesota, Third Division. (R. 1) Hearing was held on such complaint and the Court on July 24, 1942, filed its opinion, and findings of fact and conclusions of law, upholding the decision and order of the Interstate Commerce Commission. (R. 332-350)

On August 10, 1942, appellant filed with the lower Court, a Petition for Appeal and Assignments of Error, on the same date the Court allowed the appeal. (R. 350-351) On August 12, 1942, appellant filed with the Court below, a Petition for Order Staying Final Decree Pending Appeal, on the same day the District Court stayed the final decree. (R. 354-357) On August 14, 1942, appellant filed with the lower Court a Notice to the Attorney General of the State of Minnesota. (R. 357) On November 4, 1942, appellant filed with the Supreme Court a Request to Prepare and Print Record and Statement of Points To Be Relied Upon On Appeal. (R. 358)

QUESTIONS PRESENTED.

The instant case brings before this Court a novel question of law. The validity of the Interstate Commerce Commission's Order depends upon whether it and the Court below have properly interpreted Section 209, Part II of the

Interstate Commerce Act. The questions raised by appellant in which the Contract Division, American Trucking Associations, Inc., is interested are:

1. Does Section 209, Part II of the Interstate Commerce Act authorize the Commission to specify "the business of the carrier and the scope thereof" in the permits of carriers, like appellant, who have been in business prior to and continuously since July 1, 1935? (Assignment of Error 6, R. 353)

2. If the law does so authorize the Commission, does this authorization empower the Commission to describe that business in terms of the business engaged in by the carrier's shippers? (Assignment of Error 4, R. 352)

3. Does the authority to specify the business of the Carrier and the scope thereof empower the Commission to limit and restrict, appellant, and those similiarly situated to serving a certain class or classes of shippers? (Assignment of Error 8, R. 353)

4. Does the authority to specify the business of the carrier and the scope thereof authorize the Commission to limit appellant's permit for the purpose of eliminating competition? (Assignment of Error 6, R. 352)

SUMMARY OF ARGUMENT.

The argument herein presented concerns itself exclusively with a question of statutory construction, which in turn defines the limits of the Commission's authority. It is our contention that the lower Court erred in affirming the interpretation of the statute adopted by the Commission, and that such interpretation has resulted in an exercise of a power by the Commission which was not granted by Congress. Orders of the Interstate Commerce Commission which depend upon an interpretation of the law for their validity may be enjoined by this Court.

Section 209 of Part II of the Interstate Commerce Act governs the issuance of permits to contract motor carriers. The validity of the Commission's order in the in-

stant case depends upon the interpretation of the language of this section.

The lower Court affirmed the order of the Commission which limited appellant to serving persons engaged in business as packing houses and food canneries. This limitation was imposed on the theory that it specifies appellant's business and the scope of such business.

The language in the section under consideration which empowers the Commission to specify the business of the carrier and the scope thereof appears in paragraph (b) of section 209.

Appellant has been in business as a contract carrier by motor vehicle since prior to July 1, 1935. The application filed by him which led to the instant case was for the authority to which he is entitled as one who has been in business prior to and continuously since July 1, 1935. Section 209 bestows upon those in business prior to and continuously since July 1, 1935, certain rights. These rights and the standards for determining the same are found in the first proviso of paragraph (a).

As previously stated, the power to specify the business of the carrier and the scope thereof is found in paragraph (b) which governs only those who seek to enter the business of transporting property by motor vehicle subsequent to July 1, 1935. Nowhere in the so-called "grandfather" clause is the Commission given authority to specify in the permit the business of the carrier and the scope thereof, and nowhere is this language, either expressly or by implication, incorporated into the clause. The lower Court, therefore, erred in affirming the Commission's order wherein such authority was exercised.

In specifying the business of the appellant and the scope thereof the Commission applied a standard not provided for by the law. The specification which was adopted was used for the purpose of preventing appellant from competing with common carriers for business. Nothing in the "grandfather" clause of section 209 provides that the

Commission is to consider the question of competition when determining the rights to which a "grandfather" operator is entitled.

While we contend that the Commission has no authority to specify the business of the carrier and the scope thereof in the permits of "grandfather" operators, even assuming that such power does exist, it does not authorize the Commission to restrict appellant as was here done.

This Court has said that Part II of the Interstate Commerce Act is to be given a liberal construction and that no restrictions are to be imposed upon carriers which are not required by the clear requirements of the statute. In order for the Commission to specify in appellant's permit his business and the scope thereof, it is not necessary to restrict him to transporting property for a particular class or classes of shippers; therefore, the Commission in so doing restricted his "prior opportunity" beyond the "clear requirements of the statute."

A real doubt exists as to what Congress intended for the Commission to put into the permit as a specification of the business and the scope thereof; therefore, it is necessary and proper to determine the true Congressional intent. A change made in this phrase and statements made by Senator Wheeler, Chairman of the committee in charge of the legislation, both indicate that Congress did not intend for a limitation of this nature to be imposed.

Congress by the proviso found in paragraph (b) tried to protect contract carriers from the exercise of a power by the Commission which would limit their right to contract and to add or substitute vehicles. Adoption of the lower Court's interpretation of the statute will completely destroy the effect of this proviso and make it possible for the Commission to restrict appellant and others similarly situated to serving certain specified shippers and will make it possible for the Commission to limit the number of vehicles which appellant may operate.

ARGUMENT.

I.

Questions Presented Are of a Legal Nature and Do Not Require the Weighing of the Evidence by the Court.

We recognize that administrative agencies must be accorded rather broad latitude in carrying out the duties imposed upon them by Congress. However, those whose business and property are subject to the regulations of administrative tribunals are entitled to protection against the acts of such bodies which are beyond the powers delegated by Congress. Therefore, if an administrative agency issues an order based upon a misconstruction of the law it is proper for the judiciary to issue an injunction. The duty of the judiciary to issue an injunction under such circumstances is a vital and important part of the administrative processes, for otherwise the fortunes of those subject to regulation would be completely at the mercy of the regulatory authority.

1. The Commission's power to issue permits governed by statute.

Section 209, Part II of the Interstate Commerce Act, governs the granting of permits to contract motor carriers. Paragraph (a) of the section controls the granting of permits to contract carriers who were in business on July 1, 1935. According to this paragraph the Commission is to issue a permit if timely application is made and if the applicant was in bona fide operation prior to and continuously since July 1, 1935, over the route or routes or within the territory for which application was made. If these conditions are not present the application for authority is to be decided in accordance with paragraph (b) of the same section. In deciding applications under paragraph (a) the Commission is not to consider competitive factors or the fitness and ability of the applicant, but is

only called upon to determine whether the applicant was in business on the crucial date and has remained in business and whether application was made within the time prescribed by the Commission.

2. Proper for the court to disturb order of the Commission when it misconstrues the law.

This Court has in many instances set aside orders of the Interstate Commerce Commission when it has determined that the Commission has misinterpreted the statute. Without reviewing all the cases we would like to call the Court's attention to a few of such cases.

(a) The order of the Commission was set aside in *United States* v. *Pennsylvania Railroad Company*, 242 U. S. 208, 229, and *Baltimore and Ohio Railroad Company* v. *United States*, 277 U. S. 291, 299-300, because the Commission predicated its order on a misconstruction of the word "practice."

(b) In *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, the order of the Commission was set aside because it erred by attributing too narrow a meaning to the statute. In that case the Commission found that Section (15) (4) (U. S. C. Title 49, Sec. 15 (4)) of the Interstate Commerce Act only applied in favor of the carrier owning the property.

(c) In *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, the order of the Commission was set aside because it was predicated upon economic considerations rather than upon transportation ones.

(d) In *Carolina Freight Carriers Corp.* v. *United States et al.*, 315 U. S. 475, the order of the Interstate Commerce Commission was set aside because it applied different standards to the appellee as an irregular route carrier than was applied to regular route carriers even though both classes of carriers were entitled to the same treatment under the law.

II.

The Findings, Conclusions and Order of the Court Erroneously and Unlawfully Restrict the Liberal Provisions of the "Grandfather" Clause and Related Provisions of the Act, by Applying to and Embodying in that Clause the More Restrictive Provision as to Procedure in Section 209 (b) of the Act in Determining the "Grandfather" Rights Set Forth in Section 209 (a) of the Act, and Failed to Interpret the Meaning of the Liberal Language Employed by Congress in Defining, Designating and Determining "Grandfather" Rights as Distinguished from the Rights of Carriers Who Seek New or Extension Operations. (Assignment of Error 6, R. 353).

The lower Court in its opinion stated:

> "The Act itself defines the powers and duties of the Commission pertaining to the questions with which we are concerned. We thus approach a consideration of the statutory authority of the Commission under the Act. Section 209 (a) of the Act denies the right of a contract carrier to engage in business in interstate commerce within the jurisdiction of the United States without a permit by the Commission, and it specifies the conditions that entitle a carrier to a permit.
>
> "Section 209 (b) outlines the procedure for acquiring the permit and what the permit shall contain. It requires the carrier to show that he is able to render the service of a contract carrier, that he is willing to conform to the law and the lawful requirements of the Commission, and that the proposed operation will be consistent with the public interest and the declared policy of Congress; it further provides that 'the Commission shall specify in the permit the business of the Contract Carrier covered thereby and the scope thereof.'"

Section 209, Part II of the Interstate Commerce Act is set forth in full in the Appendix, *infra*, pp. 30 to 32. This sec-

tion of the law governs the issuance of permits to contract motor carriers. From the above statement of the Court it is clear that it interpreted the section as not making any distinction between contract carriers who were in business on July 1, 1935, commonly referred to as "grandfather" operators, and those who desire to enter the business subsequent to that date, commonly referred to as "new" operators. Section 209 (b) provides in part that:

> "The Commission shall specify in the permit the business of the Contract Carrier covered thereby and the scope thereof . . . "

The lower Court found that this authority of the Commission to make specifications in the permits of contract carriers applied to those in operation on July 1, 1935. It was only possible for the Court to make such a finding by interpreting the statute as not making any distinction between "grandfather" operators and "new" operators.

1. Terms of "Grandfather" clause govern permit to which appellant is entitled.

If the lower Court's interpretation of this section were followed, every contract carrier in the United States, transporting property in interstate or foreign commerce, would have been in violation of the law when the same became effective. Likewise, all so-called "grandfather" operators, in order to obtain a permit, would have had to prove that they were fit, willing and able to perform the service and that their operations were consistent with the public interest and the National Transportation Policy.

It is true that the first paragraph of the section makes it unlawful for any person to transport property in interstate or foreign commerce as a contract motor carrier without first obtaining from the Interstate Commerce Commission a permit to do so; however, the first proviso, commonly referred to as the "grandfather" clause in the Act, makes it lawful for those carriers in business on July 1, 1935, to continue until such time as the Commission shall

act upon their applications for a permit, provided that the applications for such permits were filed one hundred and twenty days after the law became effective.

The second paragraph of the section does provide in substance that the Commission shall issue a permit on a finding that the applicant is fit, willing and able to perform the service, and that the proposed service is consistent with the public interest and the National Transportation Policy; however, the "grandfather" clause provides that those contract carriers in business on July 1, 1935, need not prove that they are fit, willing and able to continue the service nor need they prove that continuance of the service is consistent with the public interest and the National Transportation Policy.

Since the Court below found that the provisions of paragraph (b) were applicable to appellant as a "grandfather" operator, it was perfectly proper to find that the Commission could specify in his permit the business and the scope thereof. The Court below erred, however, in finding that the provisions of paragraph (b) are applicable to the instant application.

To properly interpret this section due consideration must be given to the form in which it is written, as well as to the language used. The section is divided into two paragraphs, each of which contains subdivisions in the way of provisos. Paragraph (a) contains two provisos and paragraph (b) one. The paragraphs and provisos each deal with a particular subject. That part of paragraph (a), not included in either of the provisos, applies to all persons and makes it unlawful to engage in business as a contract motor carrier without a permit from the Commission. The first proviso contains an exception to this general rule and applies only to those persons who were in business on July 1, 1935, as contract motor carriers in interstate or foreign commerce and who applied for a permit within the time prescribed. This proviso also bestows on the carriers who come within its provisions certain rights and sets up stan-

dards for determining those rights. The second proviso retains in the Secretary of Interior certain jurisdiction over motor vehicles operated within national parks and monuments. That language in paragraph (b) which is not found in the proviso sets forth the manner in which applications are to be filed, the conditions under which permits are to be granted persons who were not in business on July 1, 1935, the specifications which are to be placed in such permits and the conditions under which and purposes for which restrictions or limitations may be placed in such permits by the Commission. The proviso in paragraph (b) sets forth definite limitations on the power of the Commission to restrict the permits of contract carriers.

It is readily discernible that permits are to be issued to carriers in appellant's position in accordance with the term of the so-called "grandfather" clause. That clause does not authorize the Commission to specify in the permits of such carriers "the business of the carrier and the scope thereof." The authority to so specify in the permit is found in paragraph (b) which covers the issuance of permits to the so-called "new" operators. In order to find that the Commission may so specify in the permit of the appellant and those similarly situated, it must be found that this particular portion of paragraph (b) is incorporated into the proviso either expressly or by implication.

There is nothing in the "grandfather" clause or in paragraph (b) which expressly states that the authority to specify "the business of the carrier and the scope thereof" is incorporated into the "grandfather" clause. Therefore, Congress did not expressly incorporate this language into the proviso under consideration. Is there anything in the language used by Congress which indicates that the language is incorporated into the clause by implication?

That part of the proviso dealing with the type of permit to be issued reads as follows:

> ". . . subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as

> a contract carrier by motor vehicle on July 1, 1935, over the route or routes, or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue *such permit*, . . . " (Italics added).

What type of permit was meant by Congress when it used the phrase "such permit?" Was it one which had already been described, or one the nature of which was to be described in the future?

The word "such" usually refers back to something already stated, or described; for example, in the first sentence of paragraph (a) the terms "such carrier", "such person" and "such business" are used, these terms undoubtedly refer back to "contract carrier", "person engaged in business as a contract carrier" and "the business of a contract carrier" respectively. In short, the word "such" is used to refer back to something already described. It would seem, therefore, that the term "such permit" refers back to one previously described, or the one applied for to operate over the route, or routes, or within the territory which the carrier had served prior to July 1, 1935, and since.

The "grandfather" clause does provide for the type of permit to be issued to appellant and all other contract carriers who come within its provisions; therefore, to incorporate other language into the clause which would alter the type of permit to be issued would directly violate the expressed intention of Congress. For that reason it would seem improper to incorporate this language into the proviso by implication.

Another provision of the "grandfather" clause indicates that to incorporate this language by implication would violate the true intention of Congress. Congress expressly provided in the clause that permits were to be applied for "as provided in paragraph (b)." By so providing Congress expressly incorporated into the "grandfather" clause part of paragraph (b). It would seem,

therefore, that had it intended to incorporate the language under consideration into the clause, it would have done so expressly. Since it did not, to so incorporate by implication would be a direct violation of the Congressional intent.

2. Commission applied a standard for determining rights which is not found in the law.

As previously stated, it would seem that the lower Court's interpretation of section 209 would make it necessary for appellant and all other "grandfather" operators to prove consistency with the public interest and the National Transportation Policy in order to obtain a permit to continue in business. The Commission has never made such a finding, but the application of the restriction imposed upon appellant amounts to practically the same thing. In applications for new authority the Commission in determining the issue of consistency with the public interest and the National Transportation Policy under most circumstances gives primary consideration to competitive conditions within the territory. In a leading case on this subject the Commission said:

> " . . . We think that, in order to foster sound economic conditions in the motor carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them, as against any person now seeking to enter the field of motor transportation in circumstances such as are here disclosed."[1]

In *Keystone Transportation Company Contract Carrier Application*, 19 M. C. C. 475, the restriction here under consideration was first applied. The controlling reason for imposing the restriction was an effort on the part of the Commission to control competition between contract and com-

[1] *C. and D. Oil Company Contract Carrier Application*, 1 M. C. C. 329, 332.

mon carriers, as evidenced by the following statements taken from the Commission's decision:

> "The argument herein presents a vivid picture of the struggle for competitive advantage, and possibly in some instances, even survival between motor contract carriers and common carrier."[2]

> "... In the ordinary case the permit granted authorizes the carrier to transport a particular commodity or a class of commodities from and to certain points or within a defined territory, and by its inherent nature it provides an effective bar against any undue expansion of operation or unwarranted invasion of the business of motor common carriers. On the other hand, many applications, practically speaking, are for authority to haul general commodities over irregular routes within a defined territory. If not restricted to rendering a particular type of service, a carrier, if granted the permit sought, would be able to haul general commodities between points in its territory for any shipper under contract and perform a service which is beyond its real function. Consequently, as to such carriers there is a definite need for such restrictions in the permit granted as specifically will prevent them from rendering a type of service different from that for which authority is granted, a service that easily might seriously injure the motor common carriers in the territory of operation in a manner inconsistent with the declared policy and intent of the Act and the public interest."[3]

Commissioner Lee in his dissenting opinion in the *Keystone Case*, supra, summed up the reason for imposing the restriction in a vivid manner. He said:

> "It is sought to justify this new doctrine largely on the ground that it is necessary to protect common carriers. However, the price of such protection would be too high even if common carriers required it."[4]

---

[2] 19 M. C. C. 491.
[3] 19 M. C. C. 494.
[4] 19 M. C. C. 502.

From the above statements taken from the Commission's decision it is apparent that the restriction imposed is an effort to control competition between common and contract carriers, nothing in the "grandfather" clause or nothing in section 209 or any other section of Part II of the Interstate Commerce Act gives the Commission authority to control competition between common and contract carriers in issuing permits to "grandfather" operators. The "grandfather" clause sets forth certain standards which the Commission is to follow in determining "grandfather" rights. These standards have nothing to do with competitive conditions; therefore, the Commission in deciding the instant application applied a standard to appellant's business which was not provided by Congress. In *U. S. of America and Interstate Commerce Commission* v. the *Carolina Freight Carriers Corporation*, 315 U. S. 475, the order of the lower Court, setting aside the order of the Interstate Commerce Commission, was affirmed because in the opinion of the Supreme Court the Commission had not applied the proper standards in determining the carrier's "grandfather" rights. Since the Interstate Commerce Commission in the instant case applied an improper standard, the lower Court erred in affirming the decision of the Commission.

III.

The Decision and Order of the Court Erroneously and Unlawfully Recognize a Power in the Interstate Commerce Commission to Define the Business of the Carrier and the Scope Thereof by Designating the Business, or Merely Some Part Thereof, of the Shippers for Whom the Petitioner May Transport Commodities, Whereas the "Grandfather" Clause of the Motor Carrier Act of 1935 and Its Amendment and Related Provisions Limit the Power of the Commission to Define the Business of the Carrier, Under a "Grandfather" Operation, by the Commodities He Carried and the Territory He Served. (Assignment of Error 4, R. 352.)

1. The statute does not require imposition of the restriction.

In the *Carolina Case*, supra, the Commission limited the applicant, a common motor carrier, to the transportation of certain commodities from specified points on southbound trips. This Court found such action unauthorized by the Act, stating in part:

> "... Its (the carrier's) prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system."[5]

It is true that in the *Carolina Case* this Court had before it the application of a common motor carrier, but in making the above statement the Court was speaking of the Act in its entirety and the manner in which the entire Act should be construed; therefore, it follows that in construing those provisions of the law which govern contract motor carriers, the Act should be construed liberally and appellant and other contract carriers should not be restricted "beyond the clear requirements of the statute." The Commission by

[5] 315 U. S. 489.

specifying the "business of the carrier and the scope thereof", in terms of the business of the shippers served, failed to liberally construe the Act; likewise, by using this authority to specify as a means of restricting appellant's rights, it has imposed upon appellant a restriction which is far "beyond the clear requirements of the statute." The Court below erred by affirming the Commission's action.

The lower Court in affirming the Commission's order stated:

> "Authority is expressly vested in the Commission, as we have observed to '*specify in the permit the business of the contract carier covered thereby and the scope thereof*'." (Italics added) (R. 340).

Assuming that the Commission may so specify in the permit of appellant and those similarly situated, does this authority, if liberally construed and if applied so as not to restrict appellant "beyond the clear requirements of the statute", empower the Commission to limit appellant and others so situated to serving a particular class or classes of shippers? To answer this question we must determine what the authority to "specify" authorizes, and determine the meaning of the words "business" and "scope". After making these determinations, we must ascertain exactly what the Commission has done and then finally determine whether what has been done is a liberal application of the law and whether the restriction imposed is a clear requirement of the statute.

There is nothing in the law which indicates that the words "specify", "business" and "scope" are to be given an unusual meaning. For that reason, in construing the statute these words should be given their common or ordinary meanings.[6] An accepted authority for the common meaning of words is Webster's New International Dictionary, Second Edition, Unabridged. According to this authority the verb

[6] *A. Magnano Company* v. *Hamilton, Atty. Gen., et al.*, 292 U. S. 40.

"specify" means to name or describe. The noun "business" is defined as: "Any particular occupation or employment habitually engaged in, especially for livelihood or gain." The noun "scope" has several definitions. Those which have application to the particular question at hand are:

"(1) Room or opportunity for free outlook, aim, or action; amplitude of opportunity; free course or vent; liberty.

(2) Space for freedom of movement; room; range.

(3) Length; extent; sweep."

The Commission found, and the lower Court upheld the finding, that applicant was entitled to a permit authorizing the transportation as a contract carrier by motor vehicle of:

"(a) Canned foods from Blue Island, Illinois, to St. Paul, South St. Paul, Minneapolis and Minnesota Transfer, Minnesota;

(b) Fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul, to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and points in that portion of Wisconsin in and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wisconsin, and on and south of U. S. Highway 8;

(c) The commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minnesota, and La Crosse, Wisconsin, over irregular routes; for "persons (as defined in section 203 (a) (1) of the Act) who operate food canneries or meat packing businesses."

What part of the above language names or describes the occupation in which appellant is engaged for compensation and what part of the order describes where he might engage

in such business with liberty and freedom of movement." Such portions of the order we respectfully allege are the only ones which can properly be said to specify the "business of the carrier and the scope thereof".

That part of the order which describes appellant's business as a contract carrier by motor vehicle does name the business in which he is engaged for compensation. That part of the order which states that appellant is a carrier of property is also a description of his business. That portion of the order which states further that the service is performed over irregular routes is also a description of the business. That part of the order which specifies the commodities which may be transported is also a description of appellant's business. That part of the order which sets forth the geographical limitations of appellant's authority specifies the scope of the business. That part of the order which restricts the service to "persons, . . . who operate food canneries or meat packing businesses," does not name or describe appellant's business or the scope of that business, but places a limitation or restriction on both the business and the scope.

If the Commission had specified the business of appellant and the scope thereof by saying that he is a contract carrier of property over irregular routes of certain commodities within a described area, it would have clearly satisfied the requirements of the statute, for there is nothing in Part II of the Interstate Commerce Act which clearly requires the imposition of the restriction here imposed. Since this Court found that restricting a common carrier to transporting certain commodities between specified points under certain conditions was not clearly required by a liberal interpretation of the statute, it would seem that it should likewise find that a restriction, limiting appellant and others similarly situated to a certain class of shippers, is not clearly required by a liberal interpretation of the statute.

2. Imposition of restriction contrary to congressional intent.

It is clear that there is some confusion concerning what Congress intended when it authorized the Commission to specify in the permits of contract carriers the "business of the carrier and the scope thereof." For that reason, it is proper to consider statements made by the Chairman of the Congressional Committee handling the legislation and the history of the law in order to determine the true Congressional intent.

Part II of the Interstate Commerce Act clearly authorizes the Commission to impose geographical restrictions on both certificates of common motor carriers and the permits of contract motor carriers. In the *Caroline Case*, supra, this Court found it proper under certain circumstances, and if proper standards were applied, to impose commodity restrictions on the certificates of common carriers; therefore, if the Commission in specifying the "business of a contract carrier and the scope thereof" set forth the geographical limitations within which the carrier could operate and specified the class or classes of commodities which it could transport, it would be according to contract motor carriers the same treatment which is accorded to common motor carriers, and this is exactly what Congress intended for the Commission to do.

Senator Wheeler, Chairman of the Committee on Interstate and Foreign Commerce, which handled the Motor Carrier Act of 1935, made a statement in connection with section 209 which demonstrates clearly that Congress intended for contract and common carriers to be treated alike in the granting of "grandfather" applications. In explaining the bill Senator Wheeler said:

> "Permits are to be issued to contract carriers under substantially the same conditions as certificates are issued to common carriers, except that the granting of a

[7] *Duplex Printing Press Company* v. *Deering, et al.*, 254 U. S. 443.

permit, not covered by the 'grandfather' clause, is not made conditional on a showing of public convenience and necessity. In other words, contract carriers in their applications do not have to make a showing of public convenience and necessity.

"Applicants are required to show, among other things, however, that the *proposed* operation to the extent authorized by the permit, will be consistent with the public interest and policy declared in section 202 (a)."[8] (Italics added.)

The above statement made by Senator Wheeler proves conclusively that contract carriers, coming within the provisions of the "grandfather" clause, were to be granted permits upon the same basis as common cariers, coming within the "grandfather" clause, are granted certificates, and that the carriers starting business subsequent to July 1, 1935, were to be granted a permit only upon showing that the proposed operation will be consistent with the public interest and the policy declared in section 202 (a).

The naming of the class or classes of commodities which may be transported and the territory within which they may be transported is a specification of a carrier's business and the scope thereof, while the limiting of the transportation to services performed for a certain class or classes of shippers is a specification of the *operations* and the scope thereof. Most contract carrier businesses are made up of several operations. That is why in the industry a motor carrier business is often referred to as *operations*, but never as *operation*, singularly. In distinguishing one operation in a given business from another the class of shipper for whom it is performed is sometimes used as a distinguishing feature; however, even in describing particular operations other methods of distinguishing are very often employed. Therefore, if Congress had intended for the Commission to specify each individual operation and the scope thereof, there would have been some reason to believe that Congress

[8] 79 Cong. Rec. 5654.

intended for the Commission to distinguish between operations by naming the class or classes of shippers served. The history of this statute shows clearly that Congress did not intend for the Commission to specify in the permits of contract carriers the *operations* and the scope thereof.

When the bill which later became the Motor Carrier Act of 1935 was placed before the Senate Committee on Interstate and Foreign Commerce by Commissioner Eastman, who was then Federal Coordinator of Transportation, section 209 (b) provided that:

> "The Commission shall specify in the permit the operations covered thereby and the scope thereof . . ."[9]

The Senate Committee eliminated the word "operations" and substituted the words "business of the contract carrier." This change made by the Senate Committee shows clearly that Congress did not intend for the Commission to specify in the permits of contract carriers the individual operations conducted on the "grandfather" date, but rather intended for the Commission to specify in the permit a broad statement of the business in which the carrier was engaged and the scope of that business.

If any doubt exists that this was the true intent of Congress in making the change, the following statement made by Senator Wheeler on the floor of the Senate in explanation of this change certainly clarifies that doubt:

> ". . . This section (referring to section 209) has been changed in lines 19-22, page 27, to make clear that the bill applies to the business of contract carriers and not merely operations under the individual contracts."[10]

Congress did in Part II of the Interstate Commerce Act delegate to the Commission a power to restrict and limit the permits of contract carriers. This delegation of authority is found in section 209 (b) and reads as follows:

[9] 79 Cong. Rec. 5664.
[10] 79 Cong. Rec. 5654.

> "The Commission . . . shall attach to the permit at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6))."

The power to restrict here delegated is a very limited one for it may only be used when necessary to cary out the requirements established under section 204 (a) (2) and (6). No effort was made by the Commission or by the Court below to justify the restriction imposed in the instant case as coming within the power set forth above. This restriction was saddled upon appellant for but one reason and that was to prevent him from competing with common carriers.

Does the fact that Congress delegated a limited authority to the Commission to impose restrictions and limitations in the permits of contract carriers show an intent to delegate a broader authority? The answer to this question is obviously "no" for had Congress intended for the Commission to exercise a broad discretionary power in limiting and restricting the permits of contract carriers, it would not have restricted and limited the power which it did delegate. As a matter of fact, the granting of the limited power definitely negatives an intent to grant a broader power. Therefore, the Commission, by exercising a broader power and the lower Court by approving the exercise of such power, definitely ignored the true intent of Congress.

The decision and order of the Court erroneously and unlawfully recognizes a power in the Commission to define the "business of the carrier and the scope thereof" by designating the business or merely some part thereof of the shipper whom appellant serves because a proper and liberal construction of the law does not require the imposition of such a restriction and because the imposition of the restriction is clearly contrary to the true Congressional intent.

IV.

The Findings, Conclusions and Order of the Court Unlawfully Restrict the Right of the Plaintiff to Substitute or Add Contracts Other Than With Packing Houses and Food Canneries, Contrary to the Proviso of Section 209 (b) of the Motor Carrier Act. (Assignment of Error 8, R. 353).

1. The order as presently written would prohibit service to shippers other than packing houses and food canneries.

Section 209 (b) provides in part as follows:

> "Provided, however, that no terms, conditions or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment or facilities within the scope of the permit as the development of the business and the demands of the public may require."

As we have seen, the Court below erred in affirming the Commission's order, restricting appellant to serving food packers and food canners on the theory that such a restriction was a specification of appellant's business and scope thereof. The specification of appellant's business and the scope thereof should only include the naming of the class or classes of commodities which may be transported and the territory within which they may be transported. Will a restriction, limiting appellant to serving food packers and food canners, violate the proviso set forth above if the permit contains a proper specification of the business and scope thereof.

Fresh meats, packing house products, canned foods and supplies are not shipped exclusively by packing houses and canneries. They are shipped extensively by wholesale grocers, chain grocers and food jobbers. If the restriction here imposed remains in the permit, appellant may not perform services for wholesale grocers, chain grocers or food

jobbers. For that reason, he may not substitute or add contracts with such persons; therefore, the imposition of the restriction would clearly restrict his valuable right to substitute or add contracts within a proper description of the scope of his business.

2. If the opinion of the lower court is followed, the proviso found in section 209 (b) will be rendered meaningless.

In its opinion the lower Court said:

> ". . . The business of the shipper may be described in the permit if it thus can be made more accurately to define the limitations of the business of the carrier . . . Authority was vested in the Commission to determine the character and extent of the service on the crucial date and to issue a permit in accordance therewith; and the power to specify the scope of the business meant the authority to define the extent of the operations that might be conducted under it. This means that the Commission could select the language and the method of specifying the scope of the business . . ."

The language above indicates that in the lower Court's opinion the Commission could use any language it saw fit to specify the business of appellant and the scope of that business so long as the language used accurately defined the "limitations of the business of the carrier." If this be true, the proviso quoted above is completely meaningless.

Under such an interpretation the Commission could specify appellant's business and the scope thereof as transporting property for those shipper's served on July 1, 1935. In the instant case, the Commission could describe the business and scope thereof as transporting property for Swift and Company and Libby, McNeil and Libby. If the permit contained such a specification, appellant would be precluded from serving any other shippers. Therefore, that portion of the above proviso which prohibits the Commission from attaching to the permit any limitation which would interfere with the right to substitute or add contracts would be without meaning.

On July 1, 1935, appellant operated in his business three trucks. If the Commission may describe his business and scope thereof in any manner it sees fit so long as it accurately limits his business, it might describe the business as operating three trucks, serving Swift and Company and Libby, McNeil and Libby. If the permit contained such a limitation, appellant would not be able to make any additions to his fleet. As a matter of fact, the Commission could describe the business as operating three 1935 International trucks and appellant would not be able to so much as replace the old trucks with new ones. Undoubtedly, such a restriction would render meaningless the proviso above quoted, but still such action could be taken if the lower Court's interpretation of the language is correct.

Congress had no intention to limit appellant and others similarly situated to serving a particular class of shippers or to serving particular shippers or to operating a limited number of vehicles. To be certain that the right to contract would not be so restricted, Congress passed the proviso set forth above. To follow the lower Court's opinion will completely frustrate the efforts of Congress to protect the valuable right to contract.

V.

Conclusion.

In the instant case the lower Court was called upon to pass upon the interpretation which the Interstate Commerce Commission placed upon section 209 of the Interstate Commerce Act. The Commission found that this section conferred upon it the power to specify in appellant's permit his business and the scope thereof. The Court below affirmed this finding. The lower Court erred in affirming this finding of the Commission because the language delegating authority to the Commission to make such specifications in the permits of contract carriers is found in paragraph (b) of the section which governs applications for new authority while the appellant filed for rights as a "grand-

father'' operator, and the rights to which he is entitled as such an operator are governed by the ''grandfather'' clause which is the first proviso of paragraph (a) of the section.

The Commission in specifying appellant's business and the scope thereof did so in terms of the business engaged in by the shippers served. The Court below affirmed this action. The lower Court erred in affirming the Commission's decision even if it is assumed that the Commission has authority to specify the appellant's business and the scope thereof in his permit. The Court erred because the Commission's action is not a specification of appellant's business and scope thereof, but a limitation on his right to transport property as a contract motor carrier. The Court below and the Commission recognized that the purported specification is a restriction and a limitation, for both in their respective decisions refer to it as such.

Since the so-called specification is in truth a restriction, it should be considered as such in determining whether or not the Commission acted within the powers delegated by Congress. Congress did delegate to the Commission a power to restrict the permits of contract carriers, but this power was carefully defined by Congress, authorizing the Commission to impose restriction only to carry out its duties set forth in section 204 (a) (2) and (6). Neither the Commission nor the Court attempted to justify the restriction here imposed on this basis.

It is apparent from a reading of the lower Court's opinion in the instant case and the Commission's opinion in the *Keystone Case* that the restriction here imposed was adopted for the purpose of preventing appellant from competing with common carriers. Nothing in the statute authorizes the Commission to give consideration to competitive conditions when determining the rights of a ''grandfather'' operator. In the *Carolina Case, supra*, the Commission in determining the carrier's ''grandfather'' rights gave consideration to competitive conditions. This Court in that case said:

> "This does not mean the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted."[11]

The Commission by giving consideration to competitive conditions in deciding the instant case applied a standard not provided for in the Act. This Court in the *Carolina Case* affirmed an order setting aside the order of the Commission on the grounds that the Commission in deciding the rights to which the applicant was entitled applied an improper standard.

Respectfully submitted,

C. D. Todd, Jr.,
Attorney for Intervenor.

Washington, D. C.
March 26, 1943.

[11] 315 U. S. 481.

APPENDIX.

Permits for Contract Carriers by Motor Vehicle.

"SEC. 209. (a) Except as otherwise provided in this section and in Section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to Section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation

for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under Section 204 (a) (2) and (6): *Provided, however*, That

ng terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of this business and the demands of the public may require.

General Rules and Powers of the Commission.

"SEC. 204. (a) It shall be the duty of the Commission—

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and report, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration;"